85-643

No.

Supreme Court, U.S.
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# In The Supreme Court of the United States

October Term, 1985

MARSHALL MUHAMMAD,

*Petitioner,*

vs.

UNITED STATES OF AMERICA,

*Respondent.*

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETER DAVID SUDLER
SUDLER & BARTH
*Attorneys for Petitioner*
*Marshall Muhammad*
71 Broadway
New York, NY 10006
(212) 635-9700

Dick Bailey Printers, 203 Richmond Avenue ■ Staten Island, New York 10302
Tel.: (212) 608-7666 – (718) 447-5358 – (516) 222-2470 – (914) 682-0848

## QUESTIONS PRESENTED

The petition presents three questions:

1. What standards should govern the Prosecution's use of the truth telling provisions of a cooperation agreement in examination of the Prosecution's witnesses. The question encompasses not only the issue of timing, about which the Circuits are in conflict, but the deeper issue, about which there is also a conflict, of whether the Prosecution should be permitted to use the truth telling provisions at all with respect to a witness giving testimony in its favor.

2. What should be the test of 21 U.S.C. §848's requirement that defendant have received "substantial income" from a narcotics enterprise. More particularly, may the Government rely on defendant's role in the enterprise to prove that proceeds from the enterprise were realized by defendant personally as distinguished from the enterprise in general.

3. May a district court differentiate between two defendants by requiring the jury to make special findings as to one defendant but having the jury return a general verdict as to the other.

## THE PARTIES

The Appellants in the court below, in addition to petitioner Marshall Muhammad, were Charles Jones and Raymond Piacente. The only Appellee was respondent United States of America. The United States of America filed a cross-appeal with respect to Charles Jones. That cross-appeal did not affect Marshall Muhammad.

## TABLE OF CONTENTS

*Page*

Questions Presented ..... i

The Parties ..... i

Citations to Opinions Below ..... 1

Jurisdiction ..... 2

Provisions Involved ..... 2

Statement of the Case ..... 3

The Government's Case ..... 3

The Cooperation Agreements ..... 5

Section 848 Ruling, Sentence, Appeal ..... 7

Reasons for Granting The Writ ..... 9

I. The Cooperation Agreements ..... 9

II. The Substantial Income Issue ..... 15

III. Unequal Treatment in Regard to the Special Verdict ..... 17

Conclusion ..... 19

Appendices ..... 1a

## TABLE OF AUTHORITIES

*Cases* *Page*

*Garrett v. United States*, 105 S.Ct. 2407 (1985) .....15

*Glasser v. United States*, 315 U.S. 60 (1942) .....3

*Jeffers v. United States*, 432 U.S. 137 (1977) .....15

*Pinkerton v. United States*, 328 U.S. 640 (1946) .... 18

*United States v. Arroyo-Angulo*, 580 F.2d 1137 (2d Cir.) *cert. denied*, 439 U.S. 913 (1978) .....5,9,13

*United States v. Ayala*, Docket No. 84-1364 .....15,16

*United States v. Barnes*, 604 F.2d 121, 151 (2d Cir.), *cert. denied*, 446 U.S. 907 (1980) .....9,12,16

*United States v. Beaty*, 722 F.2d 1090, 1096-97 (3d Cir. 1983) .....10,12,14

*United States v. Bland*, 697 F.2d 262 (8th Cir. 1983) ..... 17

*United States v. Bolts*, 558 F.2d 316, 321 (5th Cir.) *cert. denied* 434 U.S. 930 (1977) ..... 16

*United States v. Borello*, 766 F.2d 46 (2d Cir. 1985) ..... 10,12,14

*United States v. Craig*, 573 F.2d 513 (7th Cir.) *cert. denied*, 439 U.S. 820 (1978) .....11,12

*United States v. Creamer*, 555 F.2d 612, 617-18 (7th Cir.), *cert. denied*, 434 U.S. 833 (1977) .....11

*United States v. Chagra*, 669 F.2d 241, 257-58 (5th Cir.), *cert. denied*, 459 U.S. 846 (1982) .....16

*United States v. Desmond*, 670 F.2d 414, 416-20 (3d Cir. 1982) .....17,18

*United States v. Edwards*, 631 F.2d 1049 (2d Cir. 1980) ..... 9,12

*United States v. Graziano*, 710 F.2d 691, 697-98 (11th Cir.), *cert. denied*, 104 S.Ct. 910 (1984) .....16

*United States v. Griffin*, 705 F.2d 434, 437 (11th Cir. 1983) .....17

*United States v. Hedman*, 630 F.2d 1184, 1198-99 (7th Cir. 1970) .....11,12

*United States v. Henderson*, 717 F.2d 135, 138 (4th Cir.), *cert. denied* 104 S.Ct. 1006 (1984) .....11,12

*United States v. Hickman*, 592 F.2d 931, 932-34 (6th Cir. 1979) .....17

*United States v. Losada*, 674 F.2d 167, 173 (2d Cir.), *cert. denied*, 457 U.S. 1125 (1982) .....16

*United States v. Maniego*, 710 F.2d 24, 27 (2d Cir. 1983) .....10,14

*United States v. Orozco-Prada*, 732 F.2d 1076 (2d Cir. 1984) .....17

*United States v. Oxman*, 740 F.2d 1298, 1302-03 (3d Cir. 1984), *vacated and remanded on other grounds, sub nom. United States v. Pflaumer*, Sup.Ct. July 2, 1985, No. 84-1033 .....11

*United States v. Palmieri*, 630 F.2d 192 (3d Cir. 1980) .....17

*United States v. Roberts*, 618 F.2d 530 (9th Cir. 1980), *cert. denied*, 452 U.S. 942 (1981) .....10,11,13

*United States v. Shelton*, 588 F.2d 1242, 1257 (9th Cir.), *cert. denied*, 442 U.S. 909 (1979) .....17

*United States v. Simms*, 508 F.Supp. 1188 (W.D. La. 1980) .....18

*United States v. Singh*, 628 F.2d 758, 761 (2d Cir.), *cert. denied*, 449 U.S. 1034 (1980) .....9

*United States v. Whitehead*, 618 F.2d 523 (4th Cir. 1980) .....11

*United States v. Wilensky*, 757 F.2d 594, 598 (3d Cir. 1985) .....17

*United States v. Winter*, 663 F.2d 1120 (1st Cir.), *cert. denied*, 460 U.S. 1011 (1983) .....11,12

*OTHER*

United States Constitution, Articles II, III .....13

21 U.S.C. §848(b) .....15

F.R. Evid. 403 .....12

F.R. Evid. 607 .....11

F.R. Evid. 608(a)(2) .....14

No.

IN THE
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OCTOBER TERM 1985

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MARSHALL MUHAMMAD,
*Petitioner,*

V.

UNITED STATES OF AMERICA,
*Respondent.*

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**PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT**

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit entered May 28, 1985.

## CITATIONS TO OPINIONS BELOW

The United States Court of Appeals for the Second Circuit affirmed petitioner's conviction for violations of the narcotics laws in an opinion dated May 28, 1985 (Appendix B hereto), reported at 763 F.2d 518 (2d Cir. 1985). The Court of Appeals denied petitioner's timely petition for rehearing, with a suggestion for an *en banc*, on July 12, 1985 (Appendix A hereto). The relevant opinions of the district court (Appendix C) were oral and are not reported.

## JURISDICTION

The Court of Appeals judgment was entered May 28, 1985. A timely rehearing petition was denied on July 12, 1985. The jurisdiction of this Court rests upon 28 U.S.C. §1254(1).

## PROVISIONS INVOLVED

21 U.S.C. §848(a), (b):

> (a) Any person who engages in a continuing criminal enterprise shall be sentenced to a term of imprisonment which may not be less than 10 years and which may be up to life imprisonment, to a fine of not more than $100,000, and to the forfeiture prescribed in section 853 of this title . . .
>
> (b) For purposes of subsection (a) of this section, a person is engaged in a continuing criminal enterprise if-
>
> (1) he violates any provision of this subchapter or subchapter II of this chapter the punishment for which is a felony, and
>
> (2) such violation is a part of a continuing series of violations of this subchapter or subchapter II of this chapter-
>
> (A) which are undertaken by such person in concert with five or more other persons with respect to whom such person occupies a position of organizer, a supervisory position, or any other position of management, and
>
> (B) from which such person obtains substantial income or resources.

F.R.Evid. 403:

> Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

F.R.Evid. 607:

> The credibility of a witness may be attacked by any party, including the party calling him.

F.R.Evid. 608(a):

> (a) The credibility of a witness may be attacked or supported by evidence in the form of opinion or reputation, but subject to these limitations: (1) the evidence may refer only to character for truthfulness or untruthfulness, and (2) evidence of truthful character i admissible only after the character of the witness for truthfulness has been attacked by opinion or reputation or otherwise.

## STATEMENT OF THE CASE

*The Government's Case*

Taking the inferences most favorable to the Government, *Glasser v. United States*, 315 U.S. 60 (1942), the Government proved under Southern District indictment 83 Cr. 833 that between 1976 and 1981 certain quantities of drugs requiring prescriptions were unlawfully sold in the Harlem Community Pharmacy in Harlem and several other pharmacies in Brooklyn to purchasers who had no prescriptions (Op.

p. 4131).* The drugs included Empirin 4 (with codeine) and Doriden, a sleeping pill. Marshall Muhummad, a pharmacist, one defendant at the trial below was at certain times owner or part owner of these pharmacies (*Ibid*). Additional defendants were other owners and/or managers of the various stores — Raymond Piacente, Peter Piacente, and Muhammad's brother, Charles Jones — and a pharmacist, Milton Ortiz.

The Government's proof, by and large, was in two parts. One part was a Drug Enforcement Agency audit as of August 11, 1981 showing that for various periods going back to 1976 Harlem Community and the other pharmacies had purchased far greater quantities of Empirin 4, Doriden, and certain other prescription drugs than could be accounted for in sales via prescription and inventory on hand (Op. p. 4131). The other part was the Government's presentation of seven witnesses, mostly employees of the pharmacies, who claimed to have been involved with defendants in the illegal scheme. These witnesses included (Op. pp. 4131-32) Jean-Marie Joseph, a pharmacist at Harlem Community and, later at three of the other pharmacies; Evelyn Dorval, another pharmacist; Juanita Solas and Frederick Ibitoye, employees at one of the Brooklyn pharmacies; Cathy Jo Wilton, an administrator of a medical clinic allegedly used as a conduit of the drugs to the pharmacies; Herman Fleming, an employee of Harlem Community; and Verna Davis, who claimed to have purchased drugs illegally from Milton Ortiz (Tr. 747-48).

Both through cross-examination (e.g. Tr. 310, 649-52) and through witnesses for the defense (Tr.

*"Op." denotes the Second Circuit May 28, 1985 Opinion (Appendix B). "Tr." refers to the trial transcript.

1214-16), Muhammad disputed the testimony of Joseph, Wilton and Fleming, the co-conspirators who implicated him (Op. p. 4132). If the jury had not credited their testimony, no direct proof of the Government's charges against Muhammad would have been presented. The testimony of Dorval, Ibitoye and Solas also impacted Muhummad by aiding in establishing the Section 848 count.

*The Cooperation Agreements*

Prior to the Muhammad trial Government witnesses Jean-Marie Joseph, Evelyn Dorval, Juanita Solas, Frederick Ibitoye, Cathy Jo Wilton and Verna Davis each entered into a cooperation agreement with the Government (Op. p. 4133), providing for immunity or other lenient treatment (only one of these witnesses was charged; none was actively prosecuted or went to jail). The agreements further provided that testimony by the witness was to be truthful, otherwise the immunity arrangements would be cancelled and the witness might be subjected to prosecution for perjury and/or the narcotics law violation he or she had committed (Op. p. 4133).*

Each of these witnesses was asked by the Prosecutor during his or her direct testimony about the cooperation agreement in a manner designed to bring out the truth telling provisions. If the witness did not

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**United States v. Arroyo-Angulo*, 580 F.2d 1137, 1145 (2d Cir.), *cert. denied*, 439 U.S. 913 (1978) sets out in full a typical cooperation agreement, including the truth telling provisions. Such provisions in the Southern District of New York almost invariably include language that the witness can be prosecuted not only on the original charges, but for perjury and that the agreement, including the immunity granted by the Government, can be cancelled.

include the information about such provisions, including the threat of a perjury prosecution, in his answer, the Prosecutor asked specific questions relating thereto. See Appendix D hereto, Joseph: agreement "required of me to say the truth *** If I don't say the truth I will be prosecuted and for forgery [perjury] and for the sale of drugs." Dorval: "agreement is that I will not be prosecuted for perjury or drug offenses if I say the truth about my involvement in dispensing drugs *** If I don't say the whole truth I will be prosecuted for perjury and drug offenses." Solas: "I was supposed to help and say the truth, otherwise, I would be in trouble too for selling drugs and lying." Ibitoye: "I am supposed to tell the truth, all the truth I know about the present drug investigation *** [otherwise] I am liable for prosecution for perjury and any criminal offense relating to the drug investigation." Wilton: "The agreement is that I come here and tell the truth *** [or else] I can be charged with that." The jury thus heard from almost all the crucial Government witnesses on their direct testimony, even from Verna Davis whose testimony was eventually stricken (Tr. 1270), that these witnesses were bound by agreement to tell the truth, otherwise their cooperation agreements would be cancelled and they would be prosecuted by the government for perjury and in addition for drug offenses involved in the instant proceedings (Op. p. 4133).

Timely objection to this testimony during direct examination was made. Such objection was overruled (Appendix D).

*Section 848 Ruling, Sentence, Appeal*

Before the case went to the jury Marshall Muhammad sought dismissal of the Section 848 count as to him on the ground that the Government had not proven his personal receipt of any proceeds from the illegal sales charged in the indictment and therefore had failed to prove the "substantial income" requirement of the statute. That motion was denied (Appendix C). Muhammad also objected to the fact that the district court required the jury to make special findings on the Section 848 count as to defendant Charles Jones (the only other defendant remaining on that count), but refused any such requirement as to Muhammad. That motion also was denied (Appendix C).

The jury found Charles Jones and Marshall Muhammad guilty of conspiracy, four substantive counts in the indictment, and the continuing enterprise count (Op. p. 4130); found Raymond Piacente guilty of conspiracy (*Ibid*); and acquitted Milton Ortiz (Tr. 1596).* The district court (Mary Johnson Lowe, J.) then set aside the Section 848 verdict against Charles Jones for reasons discussed at Op. pp. 4134, 4138-39. The court sentenced Raymond Piacente to a two-year suspended sentence and five years probation; Charles Jones to five years on the conspiracy count, two years concurrently on each of the substantive counts, and five years special parole; and Marshall Muhammad to fifteen years plus a $50,000 committed fine on the Section 848 count, two years concurrently (and to the section 848 sentence) on each

*The charges against defendant Peter Piacente had been dismissed at the close of the Government's case (Tr. 942, 1089).

of the substantive counts, and five years special parole (the conspiracy and continuing enterprise convictions merged so there was no sentence on the conspiracy count). In addition the court entered judgment against Muhammad forfeiting his interest in Harlem Community, Liotta Pharmacy, Established Drug (another pharmacy) and Greenleaf Medical Center.

The Second Circuit affirmed the district court's judgment as to Marshall Muhammad. (Appendix B). It found no impropriety in the prosecution's reference to the truth telling provision of the cooperation agreements on direct examination of Government witnesses Joseph, Dorval, Solas, Ibitoye, Wilton and Davis. Because counsel for Milton Ortiz and counsel for Raymond Piacente had alluded to witness' credibility in their opening statements (Op. pp. 4134-35), it was held that the prosecution's elicitation of the truth telling provisions on direct examination, which is a violation of the rule in the Second Circuit (pp. 15-16 *infra*), was justified. The decision did not address Muhammad's contention that the "substantial income" requirement of 21 U.S.C. §848 had not been satisfied, nor his contention that the district court had erred by requiring the jury to make special Section 848 findings only for Charles Jones. The Court affirmed the convictions of Charles Jones and Raymond Piacente (Op. p. 4128), and on the Government's appeal (Kearse, J., dissenting) reinstated the Section 848 verdict against Charles Jones and remanded that aspect of the case to the district court for resentencing (Op. p. 4142).

## REASONS FOR GRANTING THE WRIT

### I

### THE COOPERATION AGREEMENTS

The Circuits conflict over the use the Government can make at trial of the truth telling provisions in cooperation agreements with its witnesses. The issues involved arise routinely in federal trials (see cases cited *infra*) and are important in the administration of justice. This Court has never addressed them.

*The Conflict in Circuits*

The First, Second, Third, Fourth, Seventh and Ninth Circuits have each recently considered questions arising out of the truth telling provisions. The most extensive consideration of this issue in the reported decisions has come in the Second Circuit.

In *United States v. Arroyo-Angulo*, 580 F.2d 1137 (2d Cir.), *cert. denied*, 439 U.S. 913 (1978), the Second Circuit held that a cooperation agreement's truth telling provisions bolstered a witness' credibility. Accordingly, such agreement could not be introduced on the Government's direct examination but only on redirect following an attack on the witness' credibility. *United States v. Barnes*, 604 F.2d 121, 151 (2d Cir.), *cert. denied*, 446 U.S. 907 (1980), reaffirmed that holding. The Circuit subsequently held in *United States v. Edwards*, 631 F.2d 1049 (2d Cir. 1980), however, following a dictum in *United States v. Singh*, 628 F.2d 758, 761 (2d Cir.), *cert. denied*, 449 U.S. 1034 (1980), that the Government could refer generally to the cooperation agreement on direct examination as a motivation for the witness to testify for the Govern-

ment, but could not include the truth telling provisions in that reference. This rule avoided "giv[ing] the jury the unjustified impression that the Government was concealing" the fact of the agreement, but prevented the Government from using "the bolstering portions of the cooperation agreement", to wit, the truth telling provisins, until redirect, after the defendant had raised the credibility issue. 631 F.2d at 1052.

None of the cited decisions resulted in a reversal. The Circuit did reverse, however, in *United States v. Borello,* 766 F.2d 46 (2d Cir. 1985), where the entire agreement had been introduced on direct examination and no opening statement attack on credibility had occurred. See *United States v. Maniego,* 710 F.2d 24 (2d Cir. 1983), discussed *infra.* The error, moreover, would not be considered harmless:

> [W]e have spelled out in a series of cases [*Arroyo-Angulo, Barnes, Singh* and *Edwards*] the procedure for introducing cooperation agreements. For us to disapprove of the present procedure permitting the bolstering of the witness's testimony and then to declare it harmless error would make our remarks in the previous cases purely "ceremonial." The error cannot be deemed harmless.

*Borello,* 766 F.2d at 58.

The other Circuits are divided or uncertain with regard to the timing issue. The Ninth Circuit agrees with the *Arroyo-Angulo* rule in the Second. *United States v. Roberts,* 618 F.2d 530, 536-37 (9th Cir.), *cert. denied,* 452 U.S. 942 (1981), following a new trial and appeal, 640 F.2d 225 (9th Cir. 1980). The Third Circuit noted a conflict in the other circuits and did not address the issue in *United States v. Beaty,* 722 F.2d

1090, 1096-97 (3d Cir. 1983), but apparently follows the *Arroyo-Angulo* rule now. *United States v. Oxman*, 740 F.2d 1298, 1302-03 (3d Cir. 1984), *vacated and remanded on other grounds sub nom., United States v. Pflaumer*, Sup. Ct. July 2, 1985. No. 84-1033. The Seventh Circuit places no limitation on when the prosecutor may introduce the truth telling provisions. *United States v. Craig*, 573 F.2d 513 (7th Cir.), *cert. denied*, 439 U.S. 820 (1978); *United States v. Hedman*, 630 F.2d 1184, 1198-99 (7th Cir.), *cert. denied*, 450 U.S. 965 (1981); *United States v. Creamer*, 555 F.2d 612, 617-18 (7th Cir.), *cert. denied*, 434 U.S. 833 (1977). Neither does the First Circuit. *United States v. Winter*, 663 F.2d 1120 (1st Cir.), *cert. denied*, 460 U.S. 1011 (1983). The Fourth Circuit has noted the conflict between the Second and Ninth Circuits on the one hand and the Seventh and First on the other, and has read its own prior decision of *United States v. Whitehead*, 618 F.2d 523 (4th Cir. 1980) as "strongly suggest[ing] agreement with the approach of the First and Seventh circuits." *United States v. Henderson*, 717 F.2d 135, 138 (4th Cir.), *cert. denied*, 104 S.Ct. 1006 (1984).

This conflict in the circuits over timing reflects a similar conflict on the more fundamental question of whether the witness' promise to testify truthfully should be before the jury at all. The Ninth Circuit has suggested that such promises be excluded altogether, including excising them from the cooperation agreement if that is introduced into evidence. *United States v. Roberts*, 618 F.2d at 536. The Seventh and First Circuits, on the other hand, citing F.R. Evid 607 (impeachment), view the truth telling provisions as highly

relevant and affirmatively encourage the prosecution to see that *all* of the cooperation agreement is before the jury. *United States v. Craig*, 573 F.2d at 519; *United States v. Hedman*, 630 F.2d at 1198-99; *United States v. Winter*, 663 F.2d at 1134. The *Arroyo-Angulo* rule in the Second Circuit reflects an intermediate position. That Circuit recognizes the dangers of the truth telling provisions but believes also that the provisions legitimately bear on credibility, *United States v. Barnes*, 604 F.2d at 151; *United States v. Edwards*, 631 F.2d at 1051 so that the provisions can be introduced but only after an attack on the witness' credibility. *United States v. Borello*, 766 F.2d at 56. The Fourth Circuit agrees that the truth telling provisions may improperly aid the Government, *United States v. Henderson*, 717 F.2d at 137, but places itself in accord with the Seventh and First Circuits on the general approach. *Id.* at 138. The ultimate view the Third and other Circuits will take is uncertain. *United States v. Beaty*, 722 F.2d at 1096.

*The Importance Of Supreme Court Review.*

It is important to the administration of justice that this Court review the various issues arising out of the truth telling provisions. One such issue is whether those provisions have so little bearing on the credibility of Government witnesses and such great potential for confusion and prejudice to a defendant, that they ought be excluded entirely from the jury's consideration when testimony favoring the Government is at issue. F.R. Evid. 403. The essential point is that the United States Attorney's Office is the *sole arbiter* of what is "truth", and in making that judgment the United States Attorney's Office cannot avoid being influenced by the fact that the witness is giving

testimony on behalf of the Government.* Truth telling provisions, therefore, offer little indication that testimony favorable to the Government is truthful. The provisions, on the contrary, might well slant testimony toward the prosecution since witnesses know that the United States Attorney is hardly likely to initiate a perjury prosecution for favorable testimony. See, in these regards, *United States v. Arroyo-Angulo*, 580 F.2d at 1150 (Friendly, J., concurring). Exclusion altogether is also supported by the fact that the circuits are so divided and confused about underlying relevance, pp. 19,20, *supra*, that juries also must be so confused beyond the point of curative instructions, *United States v. Roberts*, 618 F.2d at 536; and by the improper and prejudicial implication of "vouching" that inevitably accompanies recitation of the truth telling provisions to the jury. *Ibid.*

A second issue is whether there should be a restriction as to timing, that is, whether the Second Circuit rule of *United States v. Arroyo-Angulo*, and *United States v. Edwards*, is correct, and in connection with that, whether there are to be exceptions to the *Arroyo-Angulo* rule. At the trial below counsel for Muhammad said nothing about the credibility of the Government's witnesses in his brief opening statement (Tr. 53-56). Neither did counsel for Charles Jones (Tr. 56-61) nor counsel for Peter Piacente (Tr. 61-69). The Court of Appeals held, however, that the Government was entitled to introduce the truth telling provisions on direct examination of all its witnesses, no matter against which defendant they testified,

*Compare United States Constitution Articles II, III (separation of executive and judicial powers).

because opening statements for defendant Milton Ortiz and defendant Raymond Piacente briefly alerted the jury to the existence of the cooperation agreements (Op. p. 4135). *United States v. Maniego*, 710 F.2d 24 (2d Cir. 1983) (per curiam). The *Maniego* exception to the *Arroyo-Angulo* rule when credibility is mentioned in defendant's opening arose in a case where defense counsel did not object when the Government introduced the truth telling provisions on direct, and in which the Court of Appeals cited and relied on F.R. Evid. 608(a)(2) *(Opinion and reputation evidence of character)* which by its terms is concerned *only* with evidence in the form of opinion or reputation and has no bearing whatsoever on the truth telling provision issue. Apart from whether *Maniego* was wrongly decided, the Government has stretched *Maniego* beyond all boundaries by using *any* mention of credibility by *any* defense attorney as justifying violation of the *Arroyo-Angulo* rule as to *all* witnesses concerning *all* defendants.

Finally there are issues of harmless error and the permissible character of remarks the prosecutor may make about the truth telling provisions in his closing argument. See *United States v. Borello*, 766 F.2d at 58 (rejecting harmless error contention to insure Government compliance with rule); *United States v. Beaty*, 722 F.2d at 1097 (prosecution summation); *United States v. Arroyo-Angulo*, particularly the concurring opinion, 580 F.2d at 1145 (same; "excesses" and "prosecutorial overkill").

## II

## THE SUBSTANTIAL INCOME ISSUE*

Penalties under 21 U.S.C. §848 are severe: no less than ten years and up to life for a first narcotics offense without parole. Prosecutions under the statute have become commonplace. Yet, this Court has only rarely addressed issues thereunder, e.g., *Jeffers v. United States*, 432 U.S. 137 (1977); *Garrett v. United States*, 105 S.Ct. 2407 (1985), and never the question of what Congress intended by the Section 848 requirement that the defendant have obtained "substantial income or resources" from the predicate violations.

In this case the Government presented proof that controlled substances were sold illegally at certain pharmacies. It also presented proof that Marshall Muhammad was owner or part owner at certain times of such pharmacies. But while the "enterprise" might have realized "income or resources" from the illegal sales, there was no proof as to how much of such income or resources found its way to Marshall Muhammad. See Appendix C.

On August 1, 1985 the Second Circuit decided *United States v. Ayala*, Docket No. 84-1364. There, it rejected the Government's contention that the "substantial income" requirement had been

*The facts pertinent to this question were set forth in the Government's brief on appeal after petitioner's brief raised generally the sufficiency of the evidence. The question was discussed at length in petitioner's reply brief, thoroughly considered by the Second Circuit at oral argument, and therefore is properly before this Court.

demonstrated as to defendant Ayala since there had been insufficient direct evidence of Ayala's income or wealth, or a "hierarchical position which might circumstantially support an inference of substantial income or income or wealth" (Slip Op., p. 5369). The Court drew such inferences, however, as to Ayala's co-defendant Gonzalez on the basis of Gonzalez' "dominant position in a large hierarchical operation, distributing an exclusive brand of heroin". (*Id.*, pp. 5368-69). In *Ayala* and this case, then, the Government's burden of proof on the substantial income issue depended on defendant's role in the enterprise. Direct evidence of receipt of income was not required for a defendant at a higher part of the enterprise. Such evidence was required for others.

Most decisions addressing the "substantial income" requirement have involved direct evidence of receipt by defendant of drug revenue or drug resources. *E.g., United States v. Bolts,* 558 F.2d 316, 321 (5th Cir.), *cert. denied,* 434 U.S. 930 (1977); *United States v. Barnes,* 604 F.2d at 147; *United States v. Losada,* 674 F.2d 167, 173 (2d Cir.), *cert. denied,* 457 U.S. 1125 (1982); *United States v. Chagra,* 669 F.2d 241, 257-58 (5th Cir.), *cert. denied,* 459 U.S. 846 (1982) (narcotics in defendant's possession, contracts to sell narcotics, and ability to finance narcotics operations and lavish personal expenditures without legitimate source of income); *United States v. Graziano,* 710 F.2d 691, 697-98 (11th Cir.), *cert. denied,* 104 S.Ct. 910 (1984) (defendant possessed 4800 pounds of marijuana which was a "substantial resource").* This case, on

*The drugs sold in this case were not in themselves illegal. They could not, therefore, be considered a "substantial resource" within the holding of *Graziano.*

the other hand, as *Ayala*, turned on distinctions between roles in the enterprise. The propriety of the distinction, and the meaning of the "substantial income" requirement in general, are important questions in the administration of justice and merit review in this Court.

## III

## UNEQUAL TREATMENT IN REGARD TO THE SPECIAL VERDICT

Jury interrogatories and special verdicts are appropriate in some cases, *e.g.*, when necessary to sentencing. *United States v. Orozco-Prada*, 732 F.2d 1076 (2d Cir. 1984). Otherwise they are not favored, *United States v. Palmieri*, 630 F.2d 192 (3d Cir. 1980); *United States v. Shelton*, 588 F.2d 1242, 1257 (9th Cir.), *cert. denied*, 442 U.S. 909 (1979); *United States v. Griffin*, 705 F.2d 434, 437 (11th Cir. 1983), although they are not *per se* improper. *United States v. Desmond*, 670 F.2d 414, 416-20 (3d Cir. 1982). But see *Id*, at 420-21 (dissenting opinion). Having determined to require a special verdict, however, the issue arises whether the trial court may discriminate among defendants in regard to such a requirement. The danger is real that the jury will understand that the need for a special verdict for one defendant but not for a second implies that the issues have no substance as to the second defendant. See *United States v. Wilensky*, 757 F.2d 594, 598 (3d Cir. 1985) (trial judge's actions may unbalance fairness of the proceeding); *United States v. Bland*, 698 F.2d 262 (8th Cir. 1983) (same); *United States v. Hickman*, 592 F.2d 931, 932-34 (6th Cir. 1979) (same, citing *Quercia* v. *United States*, 289 U.S. 466 (1933)).

The single most important aspect of the proceedings below was the continuing enterprise count. When the jury received the case only two defendants remained on that count — Charles Jones and Marshall Muhammad. There were significant factual issues as to both defendants (see Appendix C). Yet, the district court required special jury findings on those issues *only* for Jones. This Court should address whether such discrimination is permissible in light of the general policies against special verdicts. *United States v. Desmond*, 670 F.2d 414.*

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* The district court's justification for the special 848 count verdict as to Jones was to insure that the jury did not use as predicate violations substantive counts of the indictment where the only basis for Jones' liability was *Pinkerton v. United States*, 328 U.S. 640 (1946). See Appendix B, Op. pp. 4138-39. *Pinkerton* was not the basis for Muhammad's substantive count liability.

The implication of the district court's view on Muhammad's guilt arising from the special verdict aspect was re-enforced by other aspects in which the district court singled out Muhammad for substantially worse treatment than that accorded the other defendants. Thus, the district court dismissed the indictment as to Peter Piacente at the close of the Government's case and then advised the jury that "This Court [has] dismissed the charges" against him (Tr. 1130); dismissed all substantive counts of the indictment as to Milton Ortiz and Raymond Piacente, with the latter such dismissal of questionable validity; and gave the jury a *Pinkerton* substantive count charge as to Charles Jones, but refused any such charge for Muhammad (Tr. 1258). The jury thus saw that there were substantial problems to the validity of the Government's various charges against various defendants but saw that there was one defendant, Marshall Muhammad, whose guilt consistently and without exception was being submitted to it exactly as the Government charged. See, as to the implications therefrom, *United States v. Simms*, 508 F. Supp. 1188 (W.D. La. 1980), and as to the repeated errors and confusion in the Government's prosecution of this case, Second Circuit Brief for Appellant Marshall Muhammad, pp. 10-13, 16-28.

## CONCLUSION

At the trial below the Government made repeated use of the cooperation agreements' truth telling provisions on direct examination of its witnesses. That use impacted the outcome of the proceeding. The truth telling provision issues arise, moreover, in regard to established rules of a Circuit that has devoted much attention to such issues. This case is a particularly appropriate one for this Court to grant certiorari with regard to the first of the Questions Presented. The additional questions as to "substantial income" and different treatment on the special verdict are important in the administration of justice and should also be reviewed.

Respectfully submitted,

SUDLER & BARTH
*Attorneys for Petitioner*
*Marshall Muhammad*
71 Broadway
New York, NY 10006
(212) 635-9700

## APPENDIX A—ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT DENYING PETITION FOR REHEARING

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

At a stated term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse, in the City of New York, on the 12th day of July one thousand nine hundred and eighty-five.

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UNITED STATES OF AMERICA,
Appellant-Cross-Appellee,

v.

CHARLES JONES, a/k/a "COFFEE", MARSHALL J. MUHAMMAD, a/k/a "MARSHALL JONES", RAYMOND PIACENTE,

Defendants-Appellees
Cross-Appellants.

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Nos. 84-1230, 84-1258, 84-1259, 84-1260
UNITED STATES COURT OF APPEALS
FILED
JUL 12 1985
ELAINE B. GOLDSMITH, CLERK
SECOND CIRCUIT

A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by counsel for the defendant-appellee-cross-appellant, Marshall J. Muhammad,

Upon consideration by the panel that heard the appeal, it is

Ordered that said petition for rehearing is **DENIED.**

It is further noted that the suggestion for rehearing in banc has been transmitted to the judges of the court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

s/ Elaine B. Goldsmith
Elaine B. Goldsmith
Clerk

# APPENDIX B—OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Nos. 605, 454, 515, 516 — August Term, 1984

(Argued: December 18, 1984 Decided: May 28, 1985)

Docket Nos. 84-1230, 84-1258, 84-1259, 84-1260

UNITED STATES OF AMERICA,
*Appellant-Cross-Appellee,*

v.

CHARLES JONES, a/k/a "COFFEE", MARSHALL J. MUHAMMAD, a/k/a "MARSHALL JONES", RAYMOND PIACENTE,
*Defendants-Appellees Cross-Appellants.*

Before:

MESKILL, KEARSE and CARDAMONE, *Circuit Judges.*

Appeal by Marshall J. Muhammad, Charles Jones and Raymond Piacente from judgments of conviction following a jury trial in the United States District Court for the Southern District of New York (Lowe, J.) for various narcotics offenses primarily through the sale of drugs by way of forged prescriptions. The United States cross-appeals from the district court's order that set aside

Jones' conviction by the jury on a charge that he was guilty of operating a continuing criminal enterprise in violation of 21 U.S.C. § 848.

Affirmed, except as to defendant Jones' judgment of acquittal on the 21 U.S.C. § 848 count. That judgment is vacated and the jury's guilty verdict is reinstated.

Judge Kearse dissents in a separate opinion from the reinstatement of the verdict against defendant Jones.

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MICHAEL P. STOKAMER, New York, New York, *for Defendant-Appellee-Cross-Appellant Charles Jones.*

EDWARD S. PANZER, New York, New York, *for Defendant-Cross-Appellant Raymond Piacente.*

RALPH NADEN, New York, New York, (Donald E. Nawi, New York, New York, of counsel), *for Defendant-Cross-Appellant Marshall J. Muhammad.*

DAVID S. HAMMER, Assistant United States Attorney for the Southern District of New York (Rudolph W. Giuliani, United States Attorney for the Southern District of New York, Stuart Abrams, Stacey J. Moritz, Assistant United States Attorneys, New York, New York, of counsel), *for Appellant-Cross-Appellee United States of America.*

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CARDAMONE, *Circuit Judge:*

Three appellants are before us as a result of their convictions arising from their involvement over several

years in the illegal distribution of a huge amount of drugs by forged prescriptions. After the jury returned a guilty verdict on a multi-count indictment against one of the appellants, the trial court set aside the verdict as to one count, which prompted the government's appeal. The resolution of the appeals from the judgments of convictions against appellants is relatively straightforward. What sets this case apart are the problems raised by the government's appeal.

The confusion began when the district court charged the jury that conspiracy violations and substantive violations attributed to a defendant because of his membership in a conspiracy could not be considered as predicate offenses to support a conviction for operating a continuing criminal enterprise in violation of 21 U.S.C. § 848 (1982). As our recent decision in *United States* v. *Young*, 745 F.2d 733 (2d Cir. 1984), makes clear, this charge was erroneous. Further, the jury was also directed to return with its verdict answers to certain written interrogatories. With this cautionary stroke, the district judge enabled us to know on what factual basis the jury reached its verdict. Such knowledge is crucial on this appeal because the jury found appellant guilty of those offenses that—despite the trial judge's charge to the contrary—we held may constitute predicates for a § 848 violation.

This is not therefore a case in which a jury possibly came to its result for an impermissible reason, but rather a situation in which a jury's sustainable verdict was reached after it acted in disregard of a legally incorrect charge. That is, this is the rare case in which two wrongs do make a right. For us to affirm the setting aside of the conviction—in light of abundant evidence of guilt—

would simply compound the wrong. Hence, we reverse the district court's order and reinstate the guilty verdict.

## I

### Proceedings Below

Marshall J. Muhammad, Charles Jones, and Raymond Piacente appeal from judgments of conviction after a jury trial in the United States District Court for the Southern District of New York (Lowe, J.). The jury found Muhammad guilty of various narcotics offenses through his arranging the sale, in drugstores with which he was affiliated, of pharmaceutical drugs without the prescriptions required by law. He was convicted of four counts of distribution of narcotics in violation of 21 U.S.C. § 841, conspiracy to violate the narcotics laws of the United States in violation of 21 U.S.C. § 846, and operating a continuing criminal enterprise in violation of 21 U.S.C. § 848. The jury found appellants Jones and Piacente guilty under § 846 of a conspiracy to violate the narcotics laws. Jones was also convicted of four substantive narcotics violations under § 841, and operating a continuing criminal enterprise under § 848.

Appellants raise a number of claims, only two of which require discussion. All of the appellants argue that the district court erred by allowing the government on its direct examination to refer to the truth-telling provisions of the witnesses' signed cooperation agreements. Jones and Piacente also claim that the presence of two alternate jurors at the onset of the jury deliberations requires reversal of their convictions. The government has appealed contending that the district court erred in setting aside Jones' conviction on the § 848 charge.

## II

### FACTS

The government's proof at trial established that between 1976 and 1983 massive amounts of prescription drugs were being dispensed without prescriptions or with forged prescriptions from the Harlem Community Pharmacy (Harlem Pharmacy) in Manhattan and the Liotta, Brownsville, and Established Pharmacies in Brooklyn. The government also proved that prescription drugs ordered for the Greenleaf Clinic in Queens were being diverted to the Harlem Pharmacy. The jury found that Muhammad, Jones, and Piacente were all involved in this illegal drug distribution scheme. Muhammad owned the Harlem Pharmacy and at some time was owner or part owner of the other pharmacies. His office was at the Harlem Pharmacy where he managed the pharmacy section. He also owned the Greenleaf Clinic. Jones managed the nonpharmacy section of the Harlem Pharmacy from 1977 to 1979, and later managed the Liotta Pharmacy. He was also part owner of the Brownsville and Established Pharmacies. Piacente managed the nonpharmacy section of the Liotta Pharmacy.

One of the government's witnesses at trial was James Stephenson, a United States Drug Enforcement Agent, who testified with respect to audits of the pharmacies and the clinic. His testimony demonstrated that purchases of controlled substances were not balanced by prescription sales, with purchases exceeding sales by a ratio of ten to one. In addition, several unindicted co-conspirators testified for the government. Jean-Marie Joseph was the supervising pharmacist at Harlem Pharmacy in 1977, later he worked part-time at Liotta and Brownsville, and

was part owner of Established where he also worked as a pharmacist. Joseph worked at Harlem Pharmacy at a time when Charles Jones managed the nonpharmacy section. Joseph testified that he and others sold controlled substances under forged prescriptions and that Jones gave him blank prescription pads and asked him to forge prescriptions at home. According to Joseph, Jones paid him for the forged prescriptions he produced, which Jones then stored in a box. He testified that the same pattern occurred at the Liotta and Established Pharmacies. Finally, Joseph testified that Muhammad often pressed him to increase both his ordering of narcotics from the wholesalers and his illegal sale and distribution of those drugs at the pharmacies.

Evelyn Dorval, a licensed pharmacist who worked at the Liotta Pharmacy, testified that Jones and Piacente sold controlled substances in the back room. Juanita Solas, who also worked at the Liotta Pharmacy, testified to her own and Jones' and Piacente's involvement in the sale of controlled substances. Frederick Ibitoye stated that he had written prescriptions at Liotta Pharmacy at Jones' and Piacente's request. Herman Fleming, a clerk and stockboy at Harlem Pharmacy, asserted that Muhammad and Jones sold drugs illegally there. Fleming also testified that he picked up packages of controlled substances from the Liotta and Brownsville Pharmacies and brought them to the Harlem Pharmacy. Cathy Jo Wilton, administrator of the Greenleaf Clinic and an indicted co-conspirator, testified that she ordered prescription narcotics for the clinic and delivered them to Muhammad at the Harlem Pharmacy. Wilton also testified that she forged prescriptions at Muhammad's request and that he supplied her with a model prescription form and blank prescription pads.

All of the above witnesses, except the DEA agent and the stockboy at Harlem Pharmacy, testified pursuant to cooperation agreements with the government. At trial these witnesses testified on direct examination regarding the portion of the cooperation agreement that required them to testify truthfully.

Shortly before the district judge charged the jury, defense counsel requested that the alternate jurors not be discharged. One of the regular jurors had indicated that she might have to leave early, and defense counsel indicated that they wanted to facilitate her substitution in that event. Appellants' counsel urged the trial court to allow two or three alternate jurors to be present during deliberations. Upon being assured that this was the choice of all the appellants, the trial judge granted this request. At the end of her charge, Judge Lowe instructed two of the alternate jurors to sit and listen to the jury's deliberations. She emphasized that although the alternates could be present, they were not to participate.

Less than two hours after the jury had retired, the government's attorney informed the court that research had revealed that alternates should not be present in a jury room during deliberations. Judge Lowe promptly recalled the jury and discharged the two alternates. At that time the court asked them whether they had participated in the deliberations. One alternate said they had not; the other was ambivalent. The trial judge then instructed the regular jurors to begin their deliberations anew and to disregard all discussions that had been held up to that point. The jury deliberated for another 14 hours before reaching its verdicts.

The district court had directed the jury to return a special verdict on Charles Jones' continuing criminal

enterprise charge, 21 U.S.C. § 848. The jury was requested, among other things, to identify the three predicate narcotics violations necessary to support a § 848 conviction. When the jury returned a guilty verdict on the continuing criminal enterprise charge against Jones, the district court set that verdict aside and entered a judgment of acquittal because it concluded that the jury had improperly relied on § 846 narcotics conspiracy violations as predicate offenses for the § 848 conviction.

## III

### Defendant's Arguments

A. *The Truth-Telling Provisions of the Cooperation Agreements*

The defendants complain that by eliciting testimony about the truth-telling portions of the witnesses' cooperation agreements the government improperly bolstered the witnesses' credibility and prejudiced defendants. Absent an attack on a witness' veracity, no evidence is admissible to bolster his credibility. *See* Fed. R. Evid. 608(a)(2); C. McCormick, *Law of Evidence* § 49 (2d ed. 1972). Ordinarily the government may not elicit evidence of truth-telling portions of cooperation agreements on direct examination. *United States* v. *Arroyo-Angulo*, 580 F.2d 1137, 1146 (2d Cir.), *cert. denied*, 439 U.S. 913, 1005 (1978) and 439 U.S. 1131 (1979). We held in *United States* v. *Maniego*, 710 F.2d 24, 27 (2d Cir. 1983) (per curiam), that as Fed. R. Evid. 608(a)(2) allows admission of credibility testimony "only after the character of the witness for truthfulness has been attacked by opinion or reputation evidence or otherwise," such evidence is admissible on direct only if the witness' credibility was

attacked in the opening argument. Here defense counsel attacked the credibility of the government's witnesses in their opening arguments.

Defense counsel questioned the motives of the government witnesses and commented on their immunity status by stating that it meant they have committed "many crimes, and they are not gonig to be prosecuted." Reference was further made in the opening to the fact that one of the government witnesses had previously committed perjury. The jury had to ask itself, another defense counsel said, whether the government witnesses they heard had "made a deal to save their own hide." Since these opening statements by defense counsel attacked the credibility of the government witnesses, appellants may not be heard to complain at their rehabilitation on direct examination.

B. *Presence of Alternate Jurors During Deliberations*

Jones and Piacente assert that the presence of the two alternate jurors in the jury room for about an hour and a half deprived them of a fair trial. Federal Rules of Criminal Procedure 24(c) states: "An alternate juror who does not replace a regular juror shall be discharged after the jury retires to consider its verdict." Unquestionably, by not discharging the two alternate jurors and allowing them to sit at the beginning of the jury's deliberations, the district court violated this rule. This mandatory rule is one that trial courts should carefully observe because of the potential for an unfair trial. When alternate jurors are present during deliberations, the possible prejudice is that the defendants are being tried not by a jury of 12, as is their right, but by a larger group. *See United States* v. *Hayutin*, 398 F.2d 944, 951 (2d Cir.), *cert. denied*, 393 U.S. 961 (1968); *United*

*States* v. *Allison*, 481 F.2d 468, 470 (5th Cir.), *aff'd after remand*, 487 F.2d 339 (5th Cir. 1973), *cert. denied*, 416 U.S. 982 (1974).

Recently, in *United States* v. *Hillard*, 701 F.2d 1052 (2d Cir.), *cert. denied*, 461 U.S. 958 (1983), we held that "a violation of Rule 24(c) does not require reversal per se, absent a showing of prejudice." 701 F.2d at 1058. In *Hillard* we refused to reverse a conviction when the trial judge substituted an alternate juror for a regular juror who became ill after deliberations had begun. The alternate juror had reaffirmed his ability to consider evidence and to deliberate fully and fairly and indicated that his discussions with the other alternate had not changed in any way his view of the case. Further, the trial judge there instructed the jurors to begin their deliberations over again after the alternate joined them. Because of the district court's painstaking efforts to minimize potential prejudice to defendants and its determination that there had in fact been no such prejudice, we found that the violation of Rule 24(c) did not constitute reversible error. 701 F.2d at 1061; *see also United States* v. *Mahler*, 579 F.2d 730, 737 (2d Cir.), *cert. denied*, 439 U.S. 872, 991 (1978).

Although *Hillard* was decided on somewhat different facts, its holding that a Rule 24(c) violation does not require reversal absent a showing of prejudice applies here. Hence, in order to determine whether a Rule 24(c) violation mandates a new trial, there must be an analysis of the facts and circumstances at trial. Some factors that should be considered are: (1) whether defendants requested or consented to the alternates' presence in the jury room; (2) how long the alternates were present; (3) whether the alternates participated in the delibera-

tions; (4) what instruction the trial judge gave before the alternates retired with the regular jurors; (5) what the alternates' statements subsequently revealed; (6) what curative instructions were given by the trial court to the "reconstituted" jury, i.e., the body without the alternates. An evidentiary hearing should be held where necessary for an evaluation of these factors. *See Allison*, 481 F.2d at 472.

Here, when the trial court sent the regular jurors out to deliberate and allowed the alternates to accompany them, it specifically instructed the alternates not to participate. The alternates were with the jury for less than two hours. When the alternates were withdrawn and questioned as to whether they had participated and one answered somewhat ambiguously, the trial court called all of the regular jurors before it and instructed that their deliberations must start again from the beginning and they were to disregard any possible participation by the alternates. The jury thereafter deliberated for 14 hours before reaching a verdict. These factors demonstrate the lack of prejudice present in this case. The brief presence of the alternates was at defendants' request. The trial court instructed the alternates not to participate, but only to sit and listen, and there was a lack of evidence that they had participated. The trial judge gave the reconstituted jury a curative instruction to start its work over again, and the ensuing 14 hours of deliberations before a verdict was reached indicates that whatever possible taint might have crept into the deliberations was effectively removed. Moreover, defendants' counsel, hoping to avoid a mistrial, argued below that inclusion of the alternates would not be revresible error because defendants had requested that course. The fact that defendants themselves believed that no harm resulted from the alternates' pre-

sence is further proof of a lack of prejudice. Defense counsel requests, which are granted by a trial court, are frequently raised as a claim of error on appeal. We look with disfavor on this trial tactic. *United States* v. *Ferguson*, Nos. 84-1069, *et al.*, slip op. at 2817-20 (2d Cir. March 28, 1985) (conviction affirmed when defendants over government objection expressly requested trial court to charge a lesser crime, one for which defendants had not been indicted); *United States* v. *Young*, 745 F.2d 733, 752 (2d Cir. 1984) (conviction affirmed despite plain error in jury charge, when that charge was invited by defendant). We hold therefore that the brief presence of alternate jurors during deliberations did not deprive Jones and Piacente of a fair trial.

## IV

### GOVERNMENT'S APPEAL

Section 848 provides that to have engaged in a continuing criminal enterprise a defendant must have "violate[d] any provision of [Subchapters I or II of Chapter 13 of Title 21]," § 848(b)(1), and such violation must be part of "a continuing series of violations [of Subchapters I or II of Chapter 13 of Title 21]," § 848(b)(2). Further, such violations must be undertaken "in concert with five or more other persons with respect to whom such person occupies a position of organizer, a supervisory position, or any other position of management," § 848(b)(2)(A). When considering her instructions on defendant Jones' § 848 continuing criminal enterprise charge, the district judge was concerned that the jury would use as predicate acts either § 846 narcotics conspiracy violations or § 841 substantive narcotics violations that Jones himself did not commit, but of which he was guilty because of his

involvement in the conspiracy, *see Pinkerton* v. *United States*, 328 U.S. 640, 646-47 (1946). The district court believed that because of the § 848(b)(2)(A) "in concert" requirement, conspiracy was a lesser included offense of the continuing criminal enterprise count and, therefore, could not properly be used as one of the § 848(b)(1) predicate acts.

*Pinkerton* was the only theory of Jones' liability submitted to the jury on the four substantive counts in the indictment. The only other offense, other than the § 848 continuing criminal enterprise, with which Jones was charged was a § 846 conspiracy. Although there was evidence of substantive narcotics violations by Jones, those violations were not included in the indictment because they occurred outside of the Southern District. The trial court therefore instructed the jury that it could not consider any of the counts in the indictment as predicate violations for a § 848 conviction against Jones. To ensure that it followed her instructions the district judge asked the jury to complete a set of interrogatories. The jury had to list: (a) the three violations of narcotics laws that it found had been proven beyond a reasonable doubt, including "the violation, the pharmacy at which it took place, and the year it took place"; (b) the five persons that it found that Charles Jones organized, supervised or managed; and (c) the names of any pharmacies to be forfeited.

The jury returned verdicts convicting Jones on all six counts of the indictment. In response to Judge Lowe's first interrogatory on Count Six, the § 848 charge, the jury identified the three predicate violations and the places and times at which they were committed as follows:

1. Jan. 1, 1978-Dec. 31, 1978
   Harlem Community Pharmacy
   Title 21 U.S. Code Sec. 846

2. Jan. 1, 1979-Dec. 31, 1979
   Harlem Community Pharmacy
   Title 21 U.S. Code Sec. 846

3. Jan. 1, 1980-Dec. 31, 1980
   Harlem Community Pharmacy
   Title 21 U.S. Code Sec. 846

Based on these answers, Judge Lowe granted Jones' request for a judgment of acquittal on the continuing criminal enterprise charge.

In *Young*, decided after the trial of the instant case, we held that "a lesser included § 846 conspiracy may serve as a predicate offense for a § 848 continuing criminal enterprise." 745 F.2d at 751-52. We found the statutory language unambiguous: "Section 848(a)(1) provides that *any* felony violation of Subchapters I and II of Chapter 13 of Title 21 is an eligible predicate." *Id.* at 750 (emphasis in original). Similar reasoning applies to a § 841 substantive violation of which defendant is guilty on a *Pinkerton* theory. This, too, is a violation of a provision of Subchapters I or II of Chapter 13 of Title 21, and as such is an eligible predicate. There is, therefore, no question that the district judge incorrectly instructed the jury not to consider § 846 violations or § 841 violations as predicate violations on a *Pinkerton* theory.

The fact that the district court made a legal error does not end the matter. The circumstances of the instructions and the verdict on Jones' § 848 count are far from clear. Whether the government objected to the district court's incorrect instructions is the first question.

Although the government apparently agreed that the § 846 count not be used as a predicate, it did not acquiesce to the court's charge that substantive § 841 *Pinkerton* counts could not be predicates.[1] Another example of some confusion is the jury's response on the special verdict form as to which predicate violations it found Jones guilty. The statute that the jury indicated Jones violated was § 846, the narcotics conspiracy law. Yet, the words the jury used tracked exactly the indictment on the § 841 substantive counts for which Jones was found guilty on a *Pinkerton* theory. The parties agreed, both at the time of trial and on this appeal, that the form of the jury's answer indicates that it was referring to Jones' *Pinkerton*-based § 841 substantive narcotics violations, not the § 846 conspiracy. Understandably, little attempt was made by the district court to resolve this ambiguity since, according to its earlier jury instructions, it believed that neither offense was a proper predicate for a § 848 violation. The dissenting opinion expresses doubts about whether the jury was actually referring to § 841 violations. We see no reason to question a conclusion about which two adverse parties, both of whom were present at trial, have agreed.

In sum, the district court incorrectly instructed the jury that none of the charges in Charles Jones' indictment could be predicate violations for the § 848 charge. Nonetheless the jury properly using substantive *Pinkerton* counts as predicate violations, convicted Jones of operating

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[1] The trial transcript reveals a lengthy discussion between the government attorneys and the trial court on the relationship of the § 848 charge and the *Pinkerton* counts. While not all of that discussion concerned use of the *Pinkerton* counts as predicates, the government did, at least on one occasion, urge, citing authority, that *Pinkerton* counts were proper predicates.

a continuing criminal enterprise. Thus, the fact-finding body found that all of the necessary factual elements of a § 848 violation existed: it found that Jones committed three predicate felony violations; that he acted in concert with five or more persons with respect to whom he occupied a supervisory position; and that he obtained substantial income from these activities. The district judge set aside the verdict not because of a lack of proof of sufficient facts to sustain the conviction, but because of what it incorrectly perceived to be a legal deficiency.

As the only error is one of law, we may correct it if, in so doing, we do not put Jones in jeopardy again for the same offense. So long as there is a jury verdict of guilt, an appellate court may correct errors of law without subjecting a defendant to any constitutional deprivation. *See United States* v. *Zisblatt*, 172 F.2d 740, 743 (2d Cir.) (L. Hand, J.), *appeal dismissed on the government's motion*, 336 U.S. 934 (1949). Simply by reinstating the jury's verdict, we can correct the district court's legal error. The reinstatement of that verdict does not violate Jones' double jeopardy rights since he will not be subjected to a second trial for the same offense. When a guilty verdict is reinstated, double jeopardy is not implicated. *See United States* v. *Wilson*, 420 U.S. 332, 352-53 (1975).

Accordingly the judgments of conviction are affirmed. The judgment of acquittal for defendant Jones on Count Six, the 21 U.S.C. § 848 charge, is reversed and the jury's verdict is reinstated. The case is remanded to the district court for resentencing.

KEARSE, *Circuit Judge*, dissenting in part:

I concur in so much of the majority's ruling as upholds the judgments of conviction entered against each of the defendants, but I respectfully dissent from the reinstatement of the verdict against Jones for violation of 21 U.S.C. § 848 (1982). The majority finds that the trial judge made one error, that the jury made another, and that these two errors offset one another, thus validating the jury's verdict against Jones on the § 848 count. Even if it were appropriate to conclude that "[here] two wrongs do make a right," Majority Opinion *ante* at 4129, in my view, the record reflects not two but at least three errors, and I see no reason to believe that the jury's verdict was not the product of confusion.

Jones was indicted on six counts. Count 1 charged him with having conspired from January 1976 to December 1983 to violate the narcotics laws, in violation of 21 U.S.C. § 846 (1982); counts 2 through 5 charged him with substantive crimes of possession of controlled substances, in violation of 21 U.S.C. § 841 (1982); and count 6 charged him with having engaged in a continuing criminal enterprise, in violation of 21 U.S.C. § 848. The government sought to establish Jones's liability for the substantive offenses under the *Pinkerton* doctrine, *Pinkerton* v. *United States*, 328 U.S. 640, 646-47 (1946), whereby a coconspirator who does not directly commit a substantive offense is liable for that substantive offense if it was commited by another coconspirator in furtherance of the conspiracy.

1. *The Trial Court's Error*

Section 848(a) provides severe penalties for a person convicted of engaging in "a continuing criminal enter-

prise," which is defined in § 848(b) as violation of a felony provision of the narcotics laws where "such violation is a part of a continuing series of [such narcotics] violations" undertaken in concert with five or more other persons" whom the defendant has organized, supervised, or managed, and from which the defendant has obtained substantial income or resources. The term "continuing series of violations" has been interpreted to require proof of three or more separate felony violations of the narcotics laws. *See, e.g., United States* v. *Young*, 745 F.2d 733, 747 (2d Cir. 1984), and cases cited therein, *cert. denied*, 105 S. Ct. 1842 (1985); *United States* v. *Losada*, 674 F.2d 167, 174 (2d Cir.), *cert. denied*, 457 U.S. 1125 (1982). In instructing the jury as to the elements of a § 848 offense, the trial judge told the jury that, in order to convict, it must find three separate narcotics violations but that it could not use for this purpose a conspiracy in violation of § 846 or any of the substantive § 841 offenses alleged in counts 2-5 (the *Pinkerton* counts).

I agree with the majority that, in light of *United States* v. *Young*, decided some months after the conclusion of the trial in the present case, the trial court's instruction to the jury not to consider a § 846 conspiracy as a predicate violation for purposes of § 848 liability was erroneous. It is clear, however, that the jury disobeyed this instruction.

2. *The Jury's First Error*

Having been given a special verdict form on which to enter its findings as to the nature, places, and dates of Jones's three separate narcotics violations upon which a verdict of his guilt on the continuing criminal enterprise count was predicated, the jury listed three predicate violations as follows:

1. Jan. 1, 1978-Dec. 31, 1978
   Harlem Community Pharmacy
   Title 21 U.S. Code Sec. 846

2. Jan. 1, 1979-Dec. 31, 1979
   Harlem Community Pharmacy
   Title 21 U.S. Code Sec. 846

3. Jan. 1, 1980-Dec. 31, 1980
   Harlem Community Pharmacy
   Title 21 U.S. Code Sec. 846

Counsel for both sides interpreted the three offenses listed as referring to the *Pinkerton* § 841 offenses charged in counts 2-4, even though the jury cited § 846 as the provision violated. Perhaps this interpretation was based on the jury's choice of dates listed, which matched the time periods alleged in counts 2-4; however, those dates also appeared in count 1, which charged a § 846 conspiracy, and Harlem Community Pharmacy is expressly mentioned only in count 1, not in any of the *Pinkerton* counts. Regardless, however, of whether it used conspiracy or the *Pinkerton* substantive offenses as its § 848 predicates, the jury clearly disobeyed the trial court's instructions, for it had been instructed that it could use neither type of offense as § 848 predicates.

The majority concludes that since the trial court's instruction was erroneous and the jury disobeyed that instruction, the verdict is valid. The soundness of this proposition is not clear to me. When the jury is given proper instructions and returns a general verdict, we assume that the jury has deliberated in accordance with the instructions it has received; and if there is any rational basis on which it could have arrived at its verdict within the legal framework it was given, we assume that is the basis on which it has operated. When, however,

the jury returns a special verdict that clearly reveals that it has disobeyed the court's instructions, we have no way of knowing (regardless of whether those instructions were correct or erroneous) within what legal framework the jury made its decision. It is inappropriate to assume that a "lay jury will *know enough* to disregard the judge's bad law if in fact he misguides them. To do so would transfer to the jury the judge's function in giving the law and transfer to the appellate court the jury's function of measuring the evidence by appropriate legal yardsticks." *Bollenbach* v. *United States*, 326 U.S. 607, 613-14 (1946) (emphasis added).

In the present case, we surely have no basis for thinking the jury was prescient as to how we would decide the *Young* case or that it had any belief that the trial court's instructions should not be followed. The reasonable inference is that the jury believed it was following the court's instructions, and the fact that it plainly did not suggests that the verdict was based on some misunderstanding. I am loath to reinstate a jury verdict of guilty that was the product of confusion.

3. *The Jury's Second Error: Version One*

Even if it were logical to conclude that the court's erroneous instruction and the jury's disobedience were mutually offsetting errors, I would think it inappropriate to reinstate the verdict, for the jury's apparent misunderstanding of the court's instructions was not its only error. As indicated above, the language of the jury's special verdict bespoke additional confusion as to whether the jury had intended to list conspiracy offenses or *Pinkerton* offenses as the three predicate acts. The parties appear to agree that the jury intended to cite § 841 and

to find as predicate acts the *Pinkerton* offenses charged in counts 2-4 of the indictment. If the parties are correct, the jury's error in citing § 846 rather than § 841 as the section violated in these predicate offenses—to which, as discussed below, it adhered after questioning by the court—is further proof of the jury's confusion in its consideration of the § 848 count.

4. *The Jury's Second Error: Version Two*

Finally, it is hardly clear to me that we should accept the parties' interpretation of the jury's verdict as merely citing the wrong statutory section. As set forth in Part 1 above, every word of the jury's specification of predicate offenses is part of count 1 of the indictment, the § 846 count. Further, when the verdict was returned and the government's attorney suggested that there was some apparent confusion in the jury's listing of predicate offenses, the trial court immediately sought clarification. It asked the jury whether it really did intend to refer to § 846. The jury's foreperson responded in the affirmative:

> THE COURT: Members of the jury, I should address this to the foreperson. As to the defendant Charles Jones under Count 6, the finding of guilty, you have with you the indictment and my charge. When you cite the three crimes, Title 21 United States Code 846, that is exactly what you intended to put; is that correct?
>
> THE FORELADY: Yes, ma'am.

Thus, notwithstanding counsel's view that the jury intended to predicate § 848 liability on the § 841 *Pinkerton* counts, the jury affirmed that it had intended to find predicate offenses in violation of § 846. The trial court then found that the jury "mean[t] exactly what the verdict sa[id]."

While perhaps we might have greater confidence in the jury's affirmation if the trial court's question had been less leading, I do not believe this Court should so easily ignore either the section cited in the special verdict, or the jury's affirmation that it in fact intended to cite § 846, or the trial court's finding, after explicit inquiry, that the jury intended, to cite § 846. Rather, I think it more appropriate to assume that the jury's citation of § 846 as the section violated in the three predicate offenses did not misspeak its intention. This assumption, however, does not mean that the jury did not commit a second error, for it appears to me that the jury erred in finding three separate conspiracies as the necessary three predicate felony violations. Obviously in some cases there could be three separate conspiracies that could serve as such predicates, but in the present case, count 1 charged Jones with having engaged in a single conspiracy that included the entire period covered by the three separate offenses found in the special verdict. The jury, properly instructed by the court as to single vs. multiple conspiracies, found Jones guilty of that single conspiracy, and, as the government's attorney stated after hearing the special verdict, "It seems very unlikely they thought there were separate conspiracies going on in those years."

Thus, it appears that the jury took a single conspiracy, of which it found Jones guilty under count 1, and carved out of it three precise one-year segments in order to find the three separate felony violations needed to support its § 848 verdict. There is a paucity of legislative history on § 848, but what little there is does not in any way suggest that Congress intended that the artificial segmentation of a single conspiracy into several should satisfy the requirement that there be a continuing "series" of violations.

## CONCLUSION

We are asked to reinstate a verdict on a count as to which (1) the trial court instructed the jury erroneously, (2) the jury mistakenly disobeyed those instructions, and (3) the jury either (a) further erred in identifying (and confirming) the section under which it found predicate violations, or (b) further erred by segmenting a single conspiracy into three separate conspiracies in order to find three § 848 predicates. Deference that we give to jury verdicts on appeal is based on our evaluations of what a rational juror may make of the evidence, operating under instructions that are not erroneous or misleading. I am hard pressed to emerge from a review of this case with a clear sense that the jury's § 848 verdict against Jones was a reasoned one based on valid doctrine rather than the product of confusion. I therefore would not reinstate the verdict against Jones on count 6.

## APPENDIX C--DISTRICT COURT OPINIONS

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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UNITED STATES OF AMERICA,

v.

MARSHALL J. MUHAMMAD, a/k/a MARSHALL JONES, et al.,

Defendant.

---

83 Cr. 833 (MJL)

TRIAL TRANSCRIPT MAY 25, 31, 1984

Tr. 1035:

MR. NADEN [Counsel for Muhammad] The last one is substantial income and resources and there's not any evidence in the record to indicate that Mr. Muhammad gained one cent from illegal drug sale.

***

Tr. 1041:

THE COURT: All right. That's conclusory. I think what Mr. Hammer [for the Government] has said is cogent, if you subtract inventory from orders with prescriptions and you get to a big minus there has to be some explanation for the minus.

If the minus, plus the evidence of cost, plus the evidence of your client's participation, if it is believed, will be sufficient to show that something came to him.

***

Tr. 1462:

MR. NADEN: [Counsel for Muhammad] I have a problem with the special findings in that they are asked for with respect to Charles Jones and not Marshall Muhammad. I raised the question in my argument as to whether or not the evidence shows beyond a reasonable doubt that Muhammad supervised five people. And I think he is entitled to those special findings also. It certainly highlights a distinction between the two 848 defendants on Count 6, and my client doesn't get the opportunity to have the jury carefully have their attention pointed to those elements of Count 6. I find that highly prejudicial under the circumstances. ***

Tr. 1464:

MR. NADEN: I submit there is a serious question as to the five-person requirement, and I argued that in my closing. I fear that the way the special findings are listed here in respect to Charles Jones, that the jury is going to gloss over Marshall Muhammad and make assumptions that are not otherwise warranted.

***

Tr. 1465:

THE COURT: I will leave it as it is. You have an exception, Mr. Nade

**APPENDIX D—Trial Transcript May 17, 21, 22, 23, 1984; Jury Verdict Form (Excerpt)**

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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UNITED STATES OF AMERICA

v.

MARSHALL J. MUHAMMAD, a/k/a MARSHALL JONES, et al.

Defendant.

---

83 Cr. 833 (MJL)

Tr. 277-78:

*Joseph-Direct*

Q. [by Assistant United States Attorney] Now, Mr. Joseph, have you entered a cooperation agreement with the United States?

A. Yes, sir.

Q. What has been promised to you in this agreement?

A. Immunity from prosecution.

Q. For these drug offenses?

A. For the sale of the drugs.

Q. What is required of you in return for this immunity?

A. It was required of me to say the truth.

Q. If you don't tell the truth what have been told might happen to you?

MR. PANZER: [counsel for Raymond Piacente] Your Honor, I object to this. This is self-serving, your Honor.

THE COURT: Overruled. It's permitted.

A. If I don't say the truth I will be prosecuted and for forgery and for the sale of the drugs.

Q. Perjury?

A. Yes, sir.

***

Tr. 405:

*Dorval-direct*

Q. [by Assistant United States Attorney] Ms. Dorval, have you entered into any cooperation agreements with the United States?

A. Yes.

Q. What are you required to do? What are the terms of this agreement?

A. The agreement is that I will not be prosecuted for perjury or drug offenses if I say the truth about my involvement in dispensing drugs that I know—if I say the whole truth about my involvement in dispensing drugs illegally.

Q. And if you don't tell the whole truth, Ms. Dorval, what are you told might happen?

A. If I don't say the whole truth, I will be prosecuted for perjury and drug offenses.

***

Tr. 513:

*Solas-direct*

Q. [by Assistant United States Attorney] Ms. Solas, have you been negotiating with the Government concerning your cooperation agreement?

A. Yes.

Q. Has any actual cooperation agreement been given you?

A. Yes.

Q. Have you actually signed a paper?

A. No.

Q. Have you been told what a cooperation agreement, if actually reached, will probably contain?

A. Yes.

Q. What were the promises that it will probably contain?

A. That I was supposed to help and say the truth, otherwise I would be in trouble, too, for selling drugs and lying.

***

Tr. 564:

*Ibitoye-direct*

Q. [by Assistant United States Attorney] Do you have a cooperation agreement with the United States?

A. Yes, I do.

Q. What are you required to do under this agreement?

A. I am supposed to tell the truth, all the truth I know about the present drug investigation.

Q. If you don't tell the truth, what have you been told might happen to you?

A. That I am liable for prosecution for perjury and any criminal offense relating to the drug investigation.

***

Tr. 720:

*Wilton-direct*

Q. [by Assistant United States Attorney] Miss Wilton, have you been charged with crimes in connection with this case?

A. Yes, I have.

Q. What crimes have you been charged with?

A. Conspiracy and drug sales.

Q. Have you entered into an agreement with the United States?

A. Yes. I have.

Q. What are the terms of that agreement?

A. The agreement is that I come here and tell the truth and that I am not—that I come here and tell the truth under oath, and that I not get into any other trouble for a period of time. Then it will be dismissed.

Q. If you don't tell the truth or you do get into further trouble, what will happen then?

A. I can be charged with all of the charges. I can be recharged with that and tried for it: If I come here and perjure myself I can be charged with that.

***

Tr. 746:

*Davis-direct*

Q. [by Assistant United States Attorney] In terms of this case, have you entered into an agreement with the Government?

A. Yes, I have.

Q. What are the terms of that agreement?

A. That I will not be prosecuted for my help in this case and that also that the U.S. Attorney will in turn write a letter to the Judge in Georgia.

Q. The letter will tell what?

A. That I cooperated on this case.

Q. If you don't tell the truth, what have you been told will happen to you?

A. That I will be charged with perjury.

***

*JURY VERDICT FORM*

Count Six

| As to the defendant: | *Guilty* | *Not Guilty* |
|---|---|---|
| Marshall J. Muhammad | _____ | _____ |

If guilty, forfeiture-
name pharmacy or pharmacies:

| As to the defendant: | *Guilty* | *Not Guilty* |
|---|---|---|
| Charles Jones | _____ | _____ |

If guilty:

a) list the three violations of the narcotic laws that you find have been proven beyond a reasonable doubt. Include the violation, the pharmacy at which it took place, and the year it took place.

b) list the five persons you find that the government has proven beyond a reasonable doubt Charles Jones organized, supervised or managed:

c) forfeiture, name pharmacy or pharmacies: